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IN THE

Supreme Court of the United States

No. 73-887

October Term, 1973

HOLDREGE COOPERATIVE EQUITY EXCHANGE,
a Cooperative Corporation,

Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY,
a Railroad Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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HOLDREGE COOPERATIVE EQUITY EXCHANGE,
a Cooperative Corporation,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Petitioner, Holdrege Cooperative Equity Exchange, a Cooperative Corporation, by William B. Craig, of the Bar of the Supreme Court of the United States of America, Counsel herein, respectfully prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which reversed

a judgment of the United States District Court for the District of Nebraska.

OPINION BELOW

The opinion of the Court of Appeals (App. 1) is not yet published in official reports, but is designated as Civil Numbers 72-1772 in the records of the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1973 (App. 1). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. No. 1254 (1) and because of the importance of the question, the need for this Court to exercise its supervisory control and the error of the Circuit Court of Appeals.

QUESTIONS PRESENTED

I.

Whether a railroad by a side track agreement can avoid financial responsibility for its negligence which occurred on common trackage.

II.

Whether the indemnification clause of the unloading pit agreement entered into by the railroad and the Holdrege Cooperative Equity Exchange and allowing the railroad to be indemnified against its own acts of negligence is contravened by Article X, Section 4 of the Nebraska Constitution.

STATE CONSTITUTION PROVISION INVOLVED

NEBRASKA CONSTITUTION

ARTICLE X, SECTION 4

The liability of railroad corporations as common carriers shall never be limited.

———o———

STATEMENT

On November 27, 1972, the United States District Court for the District of Nebraska entered a Judgment dated April 24, 1972, in favor of plaintiff Martin W. Linden, and against defendant, Chicago, Burlington & Quincy Railroad Company, a corporation, in the amount of $22,000 together with costs. The Court reserved the right to determine whether the defendant or the third-party defendant, Holdrege Cooperative Equity Exchange, a corporation, would subsequently be responsible for the payment of said Judgment.

The third-party action was presented to the United States District Court upon a Stipulation of Facts entered

into by counsel for the third-party plaintiff and third-party defendant.

The pertinent facts are that the railroad and the co-operative did enter into an indemnity agreement relating to the use of the unloading pit. Several years later, the railroad was negligent in placing an unbraked car in the common trackage area. This car moved ultimately to where it struck and injured a man at the unloading pit. The cause of the negligence was in the common trackage area; the effect was at the unloading pit.

On November 15, 1972, the Court entered a Judgment dated November 14, 1972, holding that the Chicago, Burlington & Quincy Railroad Company take nothing from third-party defendant, Holdrege Cooperative Equity Exchange, and that the action pertaining to the Third-Party Complaint be dismissed on the merits, the Holdrege Co-operative Equity Exchange recovering from the railroad its costs of action.

On September 7, 1973, the Court of Appeals reversed the judgment of said District Court.

REASONS FOR GRANTING THE WRIT

I.

The Importance Of The Question

(NOTE: The Court of Appeals refused to follow the law of Nebraska. Although their holdings are not binding upon the state courts in future cases, like a state court decision would be under *stare decisis*, the misleading quality will confuse the law and place lawyers and

state judges under misapprehensions. The decision is in direct contravention of the Constitution of the State of Nebraska.)

II.

The Supervisory Function of The United States Supreme Court Should Be Invoked

There is conflict in the decisions of the various circuits in matters relating to the right of contractual indemnity that can lawfully be demanded by common carriers. In view of the obvious increase in the importance of common carriers, these conflicts should be finally resolved.

III.

The Court of Appeals Decision is Wrong

It is contrary to the decision of *Luedeke v. Chicago and Northwestern Railway Company,* 120 Neb. 124, 231 N. W. 695 (Neb., 1930). It also contravenes the Nebraska Constitution, Article X, Section 4, and therefore the agreement relied upon by the railroad should have been declared ultra vires, void and unenforceable as against public policy.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari should be granted and the decision of the Court

of Appeals reversed and judgment entered for this Petitioner.

Respectfully submitted,

WILLIAM B. CRAIG

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Omaha, Nebraska 68114

Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 72-1772

MARTIN W. LINDEN,

Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD, A CORPORATION, AND FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, A CORPORATION,

Defendants,

CHICAGO, BURLINGTON & QUINCY RAILROAD, A CORPORATION,

Third Party Plaintiff,

Appellant,

vs.

HOLDREGE COOPERATIVE EQUITY EXCHANGE, A CORPORATION,

Third Party Defendant,

Appellee.

Appeal from the United States District Court for the District of Nebraska

Submitted: May 17, 1973

Filed: August 15, 1973

Before MATTHES, Chief Judge,* LAY and STEPHENSON, Circuit Judges.

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* Senior Circuit Judge, effective July 15, 1973.

STEPHENSON, Circuit Judge.

This cause of action arose initially out of a construction agreement (Unloading Pit Agreement) between defendant-third party plaintiff, Chicago, Burlington & Quincy Railroad Co. (C. B. & Q.) and third party defendant, Holdrege Cooperative Equity Exchange (Holdrege) under which C. B. & Q. granted permission to Holdrege to construct an unloading pit in and under trackage operated by C. B. & Q. at Holdrege, Nebraska. The pit would be used by Holdrege in connection with the unloading of railroad cars.

In an order dated April 24, 1972, the trial court entered judgment (filed on November 27, 1972) against C. B. & Q. in the amount of $22,000.00, together with costs in favor of plaintiff, Mark W. Linden, a Holdrege employee, who had been negligently injured while working underneath a hopper car located upon tracks at the west side of an under track unloader pit. The site was covered by an indemnification provision entitled paragraph "3" of the Unloading Pit Agreement. In its order, the trial court reserved the right to determine whether C. B. & Q. ultimately would be indemnified by Holdrege.

On November 14, 1972, the trial court ordered that C. B. & Q.'s third party complaint against Holdrege be dismissed upon the merits. It held that the injury sustained by Linden was not intended to be within the scope of liability as expressed by the parties in the indemnity provision.

It is from this decision that C. B. & Q. appeals. We reverse.

The trial court adopted the stipulation of facts submitted by the parties. In its memorandum of November 14, 1972, the trial court stated that the terms of the agreement relative to injuries " 'arising out of' . . . can be read to cover any and all injuries or damages that merely occur at the situs of the unloading pit or it can be read less broadly, . . . to cover any and all injuries which have a nexus or casual relationship to the unloading pit." It applied the strict rule of construction and rejected the first broad construction, and held that the situs alone was insufficient. It stated that the injury must be "within a class of injuries reasonably associated with the unloading pit to the degree that the parties could be said to have anticipated the occurrences . . ." C. B. & Q. was precluded from recovering because it failed to establish that the negligent act in question would "be more likely to occur by reason of the unloading pit facility," and that the resulting damage was not shown "to be of a class within the expectations of the parties."

The relevant facts, as stipulated, are as follows: That on the date of the accident, May 6, 1968, the Unloading Pit Agreement was in full force and effect and binding upon C. B. & Q. and Holdrege and covered the designated unloading pit only. Paragraph 3 of the Agreement reads as follows:

> "The Industry [Holdrege] further agrees to indemnify and save harmless the Railroad Company [C. B. & Q.] against all claims, demands, suits, actions, judgments, loss, costs and expense (including attorneys' fees) for death of or injury to, or loss of

> **or damage to the property of, any person or persons whomsoever, including the parties hereto and their employees, whether caused by the negligence of the Railroad Company, or otherwise, *in any manner arising out of the* construction, *maintenance, operation, use, existence,* or removel *of said unloading pit,* and/or out of the restoration of, or failure to restore, the roadbed and track as in Section 4 provided." (emphasis supplied)**

That at sometime prior to 5:00 p.m. on the date of the accident, a storm came up suddenly; that employees of both C. B. & Q. and Holdrege were of the impression that it would be severe, and began to take precautionary measures; that during the day, prior to the advancing storm, C. B. & Q. had placed a hopper car (car No. 1) over an "under track unloader" adjacent to the Holdrege Cooperative Elevator; that the point where this car was spotted was in the area described in the Unloading Pit Agreement; that C. B. & Q. employees spotted a second hopper car (car No. 2) on trackage at a point approximately 600 feet to the west of the unloading pit—not in the area described in the Agreement; that as the storm became imminent, C. B. & Q.'s brakemen attempted to make sure that the brake was on car No. 2; that the brakemen "spun the brake wheel probably about twice" and "threw a blocking piece of wood under and towards the wheels of said car;" that car No. 2 was not spotted for use in connection with the unloading pit but was placed by C. B. & Q. and remained under its care and control; that at or near the same time, Linden proceeded to car No. 1 for the express purpose of closing the car's hopper because of the storm; that Holdrege's manager

saw from his office window car No. 2 moving down the track toward car No. 1 under which he knew Linden was working; that a Holdrege employee ran from the office to warn Linden, but to no avail because of thunder, wind and noise; that another Holdrege employee jumped aboard car No. 2 but was not able to prevent impact with car No. 1, which was pushed an approximate distance of fifteen feet.

At the time of the accident, Linden was under car No. 1 using a broom to clean fertilizer which had spilled on the railroad tracks and ties beside the unloader and on top of its lid, which had been removed in order to allow the unloader to be used. As a result of the impact, Linden was dragged, crushed and pushed the approximate distance travelled by car No. 1 after impact.

The issue dispositive of this cause is whether by the terms of the indemnity provision the parties intended Holdrege to be liable for loss such as that incurred by Linden while performing his work.

At the outset, we note that this indemnity agreement does not, as Holdrege suggests, contravene Article X, § 4 of the Nebraska Constitution, which precludes railroad corporations from limiting their liability when operating as common carriers. The contract was not executed by C. B. & Q. in its capacity as a common carrier. C. B. & Q. had no public duty to consent to the construction of the unloading pit by Holdrege, and it was at liberty to lawfully bargain for indemnity against its own negligence in this instance. *See, Luedeke v. Chicago & N. W. R. Co.*,

231 N. W. 695, 696-97 (Neb. 1930); *accord, Minneapolis-Moline Co. v. Chicago, M., St. P. & P. R. Co.*, 199 F. 2d 725, 729 (8th Cir. 1952) (applying Minnesota law); and, *Michigan Millers Mut. Fire Ins. Co. v. Canadian North. Ry. Co.*, 152 F. 2d 292, 294-95 (8th Cir. 1946) (applying Minnesota law); *see also*, 6A *Corbin on Contracts*, § 1472 (1962).

In accordance with the Supreme Court's pronouncement in *United States v. Seckinger*, 397 U. S. 203, 211, 90 S. Ct. 880, 885 (1970), C. B. & Q. should not be permitted to recover for its own negligence unless we are convinced that such was the intention of the parties pursuant to the indemnity provision. Consistent with Nebraska law, we are governed by the rules applicable to construction and interpretation of contracts generally. It is our duty to fairly and reasonably interpret the language and terms of the indemnity provision based upon a reading of the contract in its entirety. *Currency Services, Inc. of Minnesota v. Passer*, 133 N. W. 2d 19, 21 (Neb. 1965).

The critical language in the indemnity provision, upon which we find liability on the part of Holdrege, states that C. B. & Q. would be indemnified by Holdrege against liability "whether caused by the negligence of the Railroad Company, or otherwise, *in any manner arising out of the* construction, *maintenance, operation, use, existence,* or removal *of said unloading pit.*" (Emphasis supplied.)

Holdrege urges that this clause be narrowly construed to include indemnification only where the unloading pit performed an active part in bringing about the injury or

damage. Holdrege refers us to *Luedeke v. Chicago & N. W. R. Co., supra,* 231 N. W. 695 (Neb. 1930) as weighing heavily in its favor. We disagree. In *Luedeke,* a dry gas unloading device was the subject of an indemnity agreement which did not contemplate indemnification for loss unassociated with the use of the unloading device. *Id.* at 697. The facts of *Luedeke* show that fire equipment was unable to reach buildings damaged by an explosion in the unloading pit because the railroad's freight cars had blocked the access route to the burning property. The Nebraska court held that under these facts, the contract as written did not free the railroad of liability since the alleged negligence was "not *caused* by the use of the unloading device" (emphasis supplied), as required by the indemnity provision in that instance.[1] The court reasoned that although the fire and resultant loss arose out of the use of the unloading device, the action was not brought to recover loss due to the fire, but only loss based upon the railroad's act of negligently blocking the access route for an unreasonable length of time. *Id.*

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1 The indemnity provision in **Luedeke** reads in pertinent part as follows: "The licensee assumes and agrees to pay for all loss or damage to property, and injury to or death of persons, including costs and expenses incident thereto, **caused by the construction, installation, maintenance, presence or use** of said pipe or pipes or said unloading device, or by reason of any failure to lock, maintain or remove the movable connections as hereinbefore provided or by their presence or use upon the property of the railway company, or by the failure of the licensee or the officers, agents or employees of the licensee to abide by or comply with any of the conditions of this licensee."

The language in the indemnity provision before us mandates a different result than that reached in *Luedeke. See generally, Missouri Pacific Railroad Co. v. Winburn Tile Mfgr. Co.,* 461 F. 2d 984, 986-88 (8th Cir. 1972) (applying Arkansas law). The plain and ordinary meaning attributed to the phrase *"in any manner arising out of the construction, maintenance, operation, use, existence, or removal of said unloading pit"* (emphasis supplied), does not, as Holdrege would have it, contemplate a showing of "proximate cause," *cf., Insurance Co. of North America v. Royal Indemnity Co.,* 429 F. 2d 1014, 1018 (6th Cir. 1970), but instead contemplates only a causal connection between the unloading pit facility and the injury, which connection we believe is adequately demonstrated upon this record.

As stipulated by the parties, Linden's presence in the unloading pit was incidental to his work. He had proceeded to car No. 1, which was situated over the under track unloader, for the express purpose of closing the hopper on the railroad car because of the storm, and was injured in the performance thereof. *See, Aluminum Co. of America v. Hully,* 200 F. 2d 257, 263 (8th Cir. 1952) (applying Iowa and Pennsylvania law).[2] Had Linden

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2 In **Hully,** the qualifying phrase ". . . or in any manner connected with . . ." is added to "arising out of" in the indemnity provision. The distinction is not critical, however, since the language in the present case is sufficiently broad and encompassing to find liability on the part of Holdrege.

been injured at the site, but as a casual observer or passer-by and not in the furtherance of Holdrege's business it would be more difficult to find that such an occurrence was contemplated by the agreement. We are convinced, however, that in this case the scope of Holdrege's liability has been clearly established as including the injury to Linden "arising out of the . . . *maintenance, operation, use*" and/or "*existence*" of the unloading pit and as being in "a class [of injuries] within the expectations of the parties."[3] We therefore reverse the decision of the district court and remand this cause with instructions to enter judgment upon the third party complaint in favor of C. B. & Q.

Reversed and Remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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3 **See also, Fix Fuel and Material Co. v. Wabash Railroad Co.,** 243 F. 2d 110, 115 (8th Cir. 1957). But note that in **Fix Fuel** the railroad could not recover from its lessee under a contract of indemnity similar to the one before us unless both parties were negligent. We held that evidence sustained the district court's finding that the injured Fix Fuel employee contributed to his own injury, and that the railroad was therefore entitled to indemnification. The critical indemnity language in the **Fix Fuel** contract reads as follows: ". . . arising from or growing out of, directly or indirectly, the existence, operation, use or maintenance of such unloading pit or its removal."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil 03555

MARTIN W. LINDEN,

Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD, A CORPORATION, AND FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, A CORPORATION,

Defendants,

vs.

HOLDREGE COOPERATIVE EQUITY EXCHANGE, A CORPORATION,

Third-Party Defendant.

JUDGMENT

(Filed November 15, 1972)

This Action came on for trial before the Court and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the third-party plaintiff, Chicago, Burlington & Quincy Railroad Co., take nothing from the third-party defendant, Holdrege Cooperative Equity Exchange, that the action pertaining to the third-party complaint be dismissed on the merits, and that the third-party defendant, Holdrege Cooperative Equity

Exchange recover of the third-party plaintiff, Chicago, Burlington & Quincy Railroad Co., its costs of action.

Dated this 14th day of November, 1972.

BY THE COURT:

/s/ Richard E. Robinson, Senior Judge,
United States District Court

Entered on the Docket November 16, 1972
Richard C. Peck, Clerk
By /s/ Sheila Ann Faiman, Dep. Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil 03555

MARTIN W. LINDEN,

Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD, A CORPORATION, AND FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, A CORPORATION,

Defendants,

vs.

HOLDREGE COOPERATIVE EQUITY EXCHANGE, A CORPORATION,

Third-Party Defendant.

MEMORANDUM

(Filed November 15, 1972)

APPEARANCES: For Third-Party Plaintiff—Harry B. Otis, Esq. of Gaines, Spittler, Neely, Otis & Moore.

For Third-Party Defendant—William B. Craig, Esq.

ROBINSON, Senior Judge.

This Matter comes before the Court following a trial to this Court without a jury. The following shall constitute this Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

The jurisdiction of this Court is founded upon diversity of citizenship and the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars [$10,000.00].

The matter was submitted to the Court upon a stipulation of facts. The issues are limited to the scope of the third-party complaint filed by Chicago, Burlington & Quincy Railroad [hereinafter referred to as C., B. & Q.] against Holdrege Cooperative Equity Exchange [hereinafter referred to as Holdrege]. A judgment in the sum of $22,000.00 was previously entered against C., B. & Q. for injuries received by Martin W. Linden [an employee of Holdrege and the original plaintiff in this action]. C., B. & Q. filed a third-party complaint against Holdrege and seeks to recover the amount of that judgment from

Holdrege on the basis of an indemnity contract between C., B. & Q. and Holdrege. Both parties stipulated that the following represents the controlling facts of the legal issues now before the Court:

"1. On May 6, 1968, at sometime prior to 5:00 P. M., a storm came up suddenly. Both the railway employees and the coop employees were of the impression that it would be a severe storm, and they began to take precautionary measures.

"2. During the day, prior to the advancing storm, the railway had placed a hopper car, SWPX62669, over an under track unloader adjacent to the Holdrege Cooperative Elevator. The point where this car was spotted was in the area described in the unloading Pit Agreement.

"3. The railway employees spotted hopper car, EUGX15 on trackage at a point approximately 600 feet to the west of the unloading pit. The point where this car was spotted was not in the area described in the Unloading Pit Agreement.

"4. At the time of the accident, there was in full force and effect and binding upon the Holdrege Cooperative and the railway company an Unloading Pit Agreement. . . . The Unloading Pit Agreement covers the designated unloading pit only, at the location shown in red on Blueprint No. 1047-17. [Neither the entire lease or the blueprint are included in this opinion but are filed as part of the record.]

"Paragraph 3 of this Agreement reads as follows:

> " 'The Industry further agrees to indemnify and save harmless the Railroad Company against all claims, demands, suits, actions, judgments, loss, costs and expense [including attorneys' fees] for death or of injury to, or loss of or damage to the

property of, any person or persons whomsoever, including the parties hereto and their employees, whether caused by the negligence of the Railroad Company, or otherwise, in any manner arising out of the construction, maintenance, operation, use, existence, or removal of said unloading pit, and/or out of the restoration of, or failure to restore, the roadbed and track as in Section 4 provided.'

"5. As the storm became imminent the railroad, through its brakeman, J. D. Hamilton, attempted to make sure that the brake was on Hopper Car EUGX15. Hamilton was on the footboard of an engine, on the south side of Hopper Car EUGX15. He reached over and spun the brake wheel probably about twice. It was not real tight. He had reached across the drawbar to do this and would get about one-half a turn each spin as he spun the brake wheel around. He also threw a blocking piece of wood under and towards the wheels of said car.

"6. Said Hopper Car, EUGX15, was not spotted for use in connection with the unloading pit but was placed by the railway and remained under its care and control.

"7. As the storm became imminent, Martin W. Linden, proceeded to Hopper Car, SWPX62669, for the express purpose of closing the hopper on said car because of the storm.

"8. Maynard Ortegren, the Manager of the Coop, looked out the office window and saw a railway car [EUGX15], moving down the track toward the hopper car under which he knew that Martin W. Linden was working.

"9. Lowell Balcom, a Coop employee ran from the Coop office to Martin W. Linden to warn him of the

approaching hopper car, EUGX15, but because of the thunder, wind, and noise, he was not able to warn Linden prior to impact.

"10. Ortegren ran from the Coop office, and jumped on the moving hopper car, EUGX15, and he attempted to tighten the brake. He found the brake to be completely loose. He spun the wheel, and finally was able to get the brake to take hold, but the hopper car slid into and against the Hopper Car, SWPX62669, under which Martin W. Linden was working.

"11. At the time of the accident, Martin W. Linden was underneath this car and was using a broom to clean up the fertilizer which had spilled on the railroad tracks and ties beside the unloader and on top of its lid which had been removed in order to allow the unloader to be used. Linden was down on one knee at the west side of the under track unloader pit and between the rails at the time of the accident. He was in process of sweeping fertilizer from the lid into the pit.

"12. The trackage from where the Hopper Car, EUGX15, was originally spotted, and where the collision occurred is an incline. Further, that a strong gusty wind did accompany and proceed the storm which did occur at or about the time of impact.

"13. The Hopper Car, EUGX15, did push Hopper Car, SWPX62669, a distance of approximately fifteen [15] feet. As a result, Martin W. Linden was dragged, crushed, and pushed approximately that distance and he suffered severe and extensive injuries." [Filing No. 28]

Briefs were submitted and oral arguments have been heard. The parties presentation of the matter to this Court is commendable.

The general issues before the Court are whether the parties intended that the C., B. & Q. would be indemnified by Holdrege under the circumstances by which Martin Linden was injured and if so, whether such indemnity agreement is contravened by Art. X, § 4 of the Nebraska Constitution.

It is the contention of Holdrege that the negligence of C., B. & Q. which caused the injuries was in no way associated with the unloading pit except for the fact that it was the situs of the injuries.

Holdrege also contends that the indemnity agreement was not intended by the parties to give C., B. & Q. blanket protection, but was limited to negligence associated in some way with the unloading pit.

The Court finds that C., B. & Q. was negligent in not properly setting the brake on the hopper car, that the railroad car in question was not spotted for use associated with the unloading pit, and that the negligence was not associated with the unloading pit facility. The facts establish that it was the wind that started the unbraked and unattended car down the track and into the hopper car spotted over the unloading pit.

C., B. & Q. argues that the fact that the negligent act occurred outside of the leased premises is not significant because the injury occurred within the leased premises as a result of the use and existence of the unloading pit.

Thus the inquiry must be directed to the issue of whether the parties clearly intended to include injuries incurred in the use of the unloading pit without regard

to the source of the negligence causing the damages. Both sides have cited *Luedeke v. Chicago & N. W. R. R. Co.*, 120 Neb. 124, 231 N. W. 695 [1930], in support of their positions. In that case an indemnity agreement was held to be inapplicable when the negligent act causing the damages was not associated with the facility described in the indemnity agreement.

Justice Day enunciated a definite rule of construction which is applicable to this agreement:

> "Where a contract, as in this case, is against a common-law liability, it should be strictly construed and not given an enforcement beyond that required by such construction . . . A provision in a lease permitting the installation of an unloading device upon a railroad right of way, which exempts the railroad from liability for damages resulting from the installation, maintenance, presence or use of such device, does not free the railroad from liability in a suit to recover damages directly resulting from the negligence of the company in unreasonably blocking a crossing, thereby delaying the fire department on its way to a fire." [231 N. W. at 697]

It is also stated in *Missouri Pacific Railroad Co. v. Arkansas Oak Flooring Co.*, 434 F. 2d 575 [8th Cir. 1970]:

> "The generally recognized rule is that an indemnity agreement should not be construed to permit the indemnitee to recover for its own negligence 'unless the court is firmly convinced that such an interpretation reflects the intention of the parties' *United States v. Seckinger*, 397 U. S. 203, 211, 90 S. Ct. 880, 885, 25 L. Ed. 2d 224 [1970]." [434 F. 2d at 579]

Thus the Court must examine the language of the indemnity provision to determine whether it is sufficiently clear that the present factual situation is within the scope of that provision.

In the present case the phrase "arising out of" is susceptible to several constructions. It can be read to cover any and all injuries or damages that merely occur at the situs of the unloading pit or it can be read less broadly, that is to cover any and all injuries which have a nexus or causal relationship to the unloading pit.

Applying the strict rule of construction the Court must reject the first construction as simply too broad to be considered as within the intention of the parties. This broad construction would even permit the railroad to be indemnified in an extreme situation. For instance, the railroad would be protected in a case where a railroad guard negligently [or intentionally] fired a shot which hit an employee working in the unloading pit. This Court is of the opinion that neither of the parties could reasonably contemplate such an application of the indemnity agreement because the association of the injury with the unloading pit would have no greater probability of occurrence than if the employee had been in an area outside of the unloading pit. The Court must therefore reject the first broad construction of the phrase "arising out of".

Thus the inquiry must be directed to the second construction and the focus must be on the issue of whether the injury that occurred was within a class of injuries

that would be reasonably associated with the unloading pit to the degree that the parties could be said to have anticipated the occurrence when the lease was entered into. The question then becomes one of degree.

The likelihood of injury associated with the unloading pit from movement of a railroad car would depend on several factors including the depth of the unloading pit, distance of overhead railroad cars, and the usual and customary manner in which the pit would be utilized. The stipulated facts are silent as to usual and customary procedures involved in the use of the pit. The third-party plaintiff, C., B. & Q., of course has the burden of proof. The Court cannot conclude on the record before it that the usual and ordinary use of the pit would create substantial increased hazards from the mere movement of a railroad car.

The Court is of the opinion that the ordinary method of moving a car over the unloading pit would not involve a collision which would create a force which would move a parked railroad car 15 feet. The approach of an unattended railroad car obviously presents a danger to anyone in the approach path whether in an unloading pit or not. In fact it may be that the use of the unloading pit mitigated the damages. Certainly there was sufficient force to present a danger to life to anyone crossing the track without respect to the unloading pit. In fact as far as the record discloses, but for the hopper car spotted over the unloading pit, the moving car may well have continued for a greater distance at a greater velocity and created greater damages.

Conversely a reasonable construction of the term "arising out of" would embrace a class of injuries that could be expected to occur without the intervention of extraneous negligence. For example, an injury caused by the failure or use of some component of the equipment used in the unloading process, or someone falling in the pit, and conceivably any damage incurred in the unloading pit which was not the result of an unrelated extrinsic act would be considered within the expectation of the parties.

Moreover it is interesting to note that in other cases cited by the third-party plaintiff, C., B. & Q., that the negligence was associated with the facility which was the subject of the lease or that the risk involved was expressly set forth in the indemnity agreement.

C., B. & Q. cites *O-N-L Mills, Inc. v. Union Pacific R. R. Co.*, 151 Neb. 692, 39 N. W. 2d 501, 503 [1949], but that simply reiterates the rule that:

> "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles."

The damage in that case was caused by fire and the lease explicitly provided that:

> "[T]here will be constant danger of injury and damage by fire." [39 N. W. 2d at 502]

Obviously the risk was one plainly foreseen by all the parties because it was expressly mentioned in the agreement.

Fireman's Ins. Co. v. Chicago, St. P. & Q. Ry. Co., 116 F. Supp. 289 [D. Neb. 1953], was also a situation where fire caused the damage and the risk of loss by fire was explicitly set forth in the indemnity agreement:

> "It is understood and agreed that the movement of railroad locomotives involves some risk of fire . . ." [116 F. Supp. at 290]

Missouri Pacific Railroad Co. v. Winburn Tile Mfg. Co., 461 F. 2d 984 [8th Cir. 1972], was an action under Arkansas law, wherein a railroad was held to be entitled to indemnity. In that case the pertinent language of the indemnity agreement was substantially the same as the agreement in this action except it dealt with gates which crossed the side track. [It also excluded the case where the railroad was solely negligent unlike the present action — but the court held that both the shipper and railroad were negligent.] The gate, due to negligence, swung toward the track and struck a switchman riding on a moving freight car. Judge Van Pelt upholding the indemnity agreement stated:

> "While it is true that an indemnification provision must be clear and unequivocal in order to be upheld . . . we believe the provision here clearly sets forth the Tile Company's duty. . . . The *negligent conduct which resulted in the injury* to [the switchman] *is specifically covered by this language.*" [Emphasis supplied.] [461 F. 2d at 988]

Again the negligent conduct was directly associated with the gate and there was more than mere injury at the site of the gate which was the result of some negligent act not associated with the gate.

In *Seymour v. Chicago and Northwestern R. R. Co.*, 124 N. W. 2d 157 [Iowa 1963], an indemnity agreement was held to protect the railroad but once again the act was associated with the facility. There the railroad had spotted cars close to an intersection which obscured the view. The Iowa Supreme Court found that the cars which blocked the view "were there *in connection with the operation and use of the facility,* and they increased the hazards of railroading." [Emphasis supplied.] [124 N. W. 2d at 160]

The Court is of the opinion that in view of the applicable law and facts of this case that the railroad should not be allowed to recover for the damage caused by its negligent act, which act was not shown to be more likely to occur by reason of the unloading pit facility, and which damage was not sufficiently established to be of a class within the expectations of the parties.

The Court does not hold that the indemnity agreement which indemnifies a party against his own negligence is contrary to public policy, rather the Court holds that the evidence does not establish that the basis for all claims of indemnity is within the scope of the indemnity agreement in this instance. The Court does not reach the issue of whether this indemnity agreement would contravene Art. X, § 4 of the Nebraska Constitution because the negligent act occurred when the railroad was acting as a common carrier.

A judgment for the third-party defendant, Holdrege Corporation Equity Exchange, will be entered.

The foregoing shall constitute this Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Dated this 14th day of November, 1972.